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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

ERIE COAL & COKE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 9, 1930
CERTIORARI GRANTED NOVEMBER 24, 1930

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court, Western Pennsylvania

ERIE COAL & COKE COMPANY, A CORPORATION, APPELLEE

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-third District of Pennsylvania, appellant

Docket entries

April 24, 1928. Præcipe for Summons in assumpsit and statement of claim filed. Summons issued.

April 25, 1928. Summons returned served by handing to and leaving a true and attested copy with D. B. Heiner at Pittsburgh, Pa., on April 24, 1928.

May 7, 1928. Præcipe for appearance of John D. Meyer and Wm. J. Aiken for defendant filed.

August 1, 1928. Affidavit of defense filed.

Oct. 1, 1928. Præcipe for trial list filed.

Oct. 26, 1928. Waiver of a jury filed.

Nov. 20, 1928. Stipulation of facts filed. Addition to stipulation of facts filed. Trial without a jury before McVicar, J. Trial closes.

Jan. 28, 1929. Opinion filed and entered holding that the plaintiff is entitled to recover from the defendant.

Jan. 29, 1929. Certificate of probable cause filed.

Feb. 6, 1929. Order filed and entered directing that judgment be entered in favor of the plaintiff Erie Coal and Coke Co. and against the defendant, D. B. Heiner, Internal Revenue Collector, in the sum of $65,706.07, together with interest from April 20, 1926.

2 April 30, 1929. On petition of defendant, order entered allowing an appeal. Bill of exceptions sealed by the court and filed. Assignment of error filed. Citation issued, returnable May 30, 1929.

May 6, 1929. Stipulation for printing the record filed.

In United States District Court

Statement of claim

Filed Apr. 24, 1928

Erie Coal & Coke Company, plaintiff above named, brings this suit against D. B. Heiner, collector of the United States internal revenue for the Twenty-third District of Pennsylvania, defendant above named, to recover the sum of $65,706.07, with interest thereon from April 20, 1926, upon a cause of action of which the following is a statement:

1. Erie Coal & Coke Company is and was at the times herein mentioned, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

2. D. B. Heiner, at the time of the payment of the tax hereinafter mentioned was and still is the collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being
3 duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania and a resident of the city of Pittsburgh in the said Western District of Pennsylvania.

3. Plaintiff, on April 1, 1918, filed its income and excess-profits tax return for the calendar year 1917 and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591, Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff filed a claim in abatement against said additional tax assessment of $133,252.97, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon, defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said defendant, plaintiff paid to defendant said sum of $65,706.07.

7. Plaintiff avers that at the time the proceedings to collect said additional tax assessment were instituted, and at the time of
4 the payment thereof, as aforesaid, plaintiff's liability, if any, for the payment thereof had been extinguished and the collection of said tax was barred by the statutes of limitation then in force and effect and as enacted by the Congress of the United States.

8. Plaintiff further avers that on April 27, 1927, it filed with defendant a claim for refund for said tax illegally collected as aforesaid, but said claim for refund has not been acted upon.

9. Plaintiff is advised and believes, and therefore avers, that there existed no warrant in law for demanding and collecting from the plaintiff by the defendant of the said additional tax assessment: that the collection of the said tax on April 20, 1926, was barred by the statutes of limitation then in effect, and that plaintiff's liability, if any, for the payment of said tax had then been extinguished; and the plaintiff avers that the said tax of $65,706.07 was erroneously and illegally collected and erroneously and illegally retained by the defendant, and the plaintiff further avers that no part of the said tax of $65,706.07 has been repaid to the plaintiff, and the whole amount thereof, with interest thereon from April 20, 1926, remains due and owing from the defendant to the plaintiff.

Wherefore plaintiff brings this suit.

BROWN & MCCAWLEY,
ROSE & EICHENAUER,
Attorneys for Plaintiff.

Duly sworn to by Levi Deal; jurat omitted in printing.

5 In United States District Court

Affidavit of defense

Filed Aug. 1, 1928

Comes now D. B. Heiner, defendant above named, and alleges that he has a full, true, just, and legal defense to all of plaintiff's statement of claim, and that the nature of the defense is as follows:

1. The allegations contained in paragraph "1" of the statement of claim are admitted.

2. The allegations contained in paragraph "2" of the statement of claim are admitted.

6 3. The allegations contained in paragraph "3" of the statement of claim are admitted.

4. The allegations contained in paragraph "4" of the statement of claim are admitted.

5. The allegations contained in paragraph "5" of the statement of claim are admitted, but the defendant avers in addition that the said claim in abatement was filed before the statute of limitations applicable to the collection of said additional assessment of $133,252.97 had expired; that said claim in abatement was pending as to the $65,706.07 additional taxes here in issue until March 23, 1926, when it was finally rejected for said amount of $65,706.07; that during the period in which said claim in abatement was pending the collection of the said additional tax of $65,706.07 was stayed and prevented by reason of the fact that said claim was pending before the Bureau of Internal Revenue.

6. The allegations contained in paragraph "6" of the statement of claim are admitted.

7. In answer to the allegations contained in paragraph "7" of the statement of claim defendant denies that at the time the proceedings to collect said tax were instituted and/or at the time of the payment thereof plaintiff's liability for payment thereof had been extinguished; and defendant also denies that the collection thereof was barred by the statutes of limitation then applicable thereto.

7 On the contrary, defendant avers that said collection was made on April 20, 1926, within one year subsequent to the denial of the claim in abatement mentioned and described in said statement of claim, which said claim in abatement was filed on May 4, 1921, within two months of the assessment of said additional tax for the year 1917 in the month of March, 1921. Defendant further alleges that said claim in abatement was accompanied by bond filed by the plaintiff with the defendant conditioned upon the payment by the plaintiff of any part of said additional tax still found due after consideration of the claim in abatement and action thereon by the Commissioner of Internal Revenue. This bond was in full force and effect until the payment of said $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00, conditioned upon the payment

of interest upon the said sum of $65,706.07. Defendant further alleges that the Commissioner of Internal Revenue accepted an offer in compromise of said interest liability in the sum of $2,500.00, the payment of which was made by plaintiff to the Commissioner of Internal Revenue in lieu of said interest.

8. The allegations contained in paragraph "8" of the statement of claim are admitted, except that defendant denies that said tax was illegally collected, and alleges, on the contrary, that the collection thereof was in all respects just and legal.

9. In answer to the allegations contained in paragraph "9" of the statement of claim, defendant admits that no part of the said
8 $65,706.07 has been repaid to the plaintiff, but denies each and every other allegation contained in said paragraph, and further alleges that the collection of said tax was in all respects legal and just and made within the period of limitation properly applicable thereto and while the liability of the plaintiff therefor was in full force and effect.

Wherefore defendant owes the plaintiff nothing and demands judgment in his favor and his costs in this behalf expended.

D. B. HEINER,
Collector of Internal Revenue.
JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania.
WM. J. AIKEN,
Assistant U. S. Attorney for the Western District of Pennsylvania.
JOHN A. McCANN,
Special Assistant to the U. S. Attorney.
Attorneys for the Defendant.

Duly sworn to by D. B. Heiner: jurat omitted in printing.

9 In United States District Court

Bill of exceptions

Filed Apr. 30, 1929

Be it remembered that at the trial of this cause in this court at the regular November, A. D. 1928, term thereof, holden in the city of Pittsburgh, Pennsylvania, before the Honorable Nelson T. McVicar, district judge, the following proceedings were had:

The services of a jury were waived by written stipulation filed with the clerk, and the cause was tried to the court without a jury on the twenty-fifth day of January, A. D. 1929. The following proceedings were had at the trial:

The parties filed a written stipulation of facts, as follows:

10 *Stipulation of facts*

It is hereby, stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. Erie Coal & Coke Company is and was on April 1, 1918, and at all times subsequent thereto a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

2. D. B. Heiner at the time of the payment of the tax hereinafter mentioned was and now is collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania.

3. Erie Coal & Coke Company, the plaintiff, on April 1st, 1918, filed its tentative income and excess profits tax return for the calendar year 1917, and on June 11th filed its completed return and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591,
11 Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff, for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff on May 4, 1921, filed a claim in abatement against said additional tax assessment of $133,252.97, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said defendant, plaintiff paid to defendant said sum of $65,706.07.

7. On April 27, 1927, plaintiff filed with defendant a claim for refund for said tax collected as aforesaid, to wit, $65,706.07, but said claim for refund has not been acted upon.

8. When plaintiff on May 4, 1921, filed its claim in abatement said claim was accompanied by a bond conditioned upon the payment by the plaintiff of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment by plaintiff of the said sum of $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00 conditioned upon the payment of interest upon the said sum of $65,706.07. Plaintiff made an offer in compromise of

12 said interest charge in the sum of $2,500.00, which offer was accepted by the Commissioner of Internal Revenue, and plaintiff accordingly paid said sum.

ROSE AND EICHENAUER,
Attorneys for Plaintiff.
JOHN D. MEYER,
U. S. Attorney,
JOHN A. MCCANN,
Special Ass't.,
Attorneys for Defendant.

Thereafter a supplemental stipulation of facts was filed by the parties, as follows:

Additional stipulation of facts

By leave of court first had and obtained, it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts, in addition to those already stipulated, shall be taken as true in this case, provided, however, that this stipulation shall be without prejudice to either party to introduce other and further evidence not inconsistent to the facts herein stipulated to be true:

I

13 No consent in writing between the taxpayer and the Commissioner of Internal Revenue, extending the statutory period of limitation (such consents being commonly known and designated as waivers), has ever been entered into in this case.

II

Attached hereto is a true copy of the bond referred to in paragraph eight of former stipulation.

H. B. MCCAWLEY,
ROSE & EICHENAUER,
Attorneys for Plaintiff.
JOHN D. MEYER,
U. S. Attorney,
JOHN A. MCCANN,
Special Assistant,
Attorneys for the Defendant.

Bond covering claim for the abatement of income and profits taxes

Know all men by these presents, that Erie Coal and Coke Company, as principal, and Globe Indemnity Company, of Newark, New Jersey, as surety, are held and firmly bound unto the United States of America in the sum of three hundred twenty-five thousand and no/100 ($325,000.00) dollars, lawful money of the United States, for

the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

14 Whereas, the above-bounden principal has been assessed income profits taxes for the year 1917 and claims that the whole portion thereof has been illegally assessed against it and desires to file a claim for the abatement thereof, and further desires that the collection of the amount covered by said claim for abatement be deferred until such time as that claim has been finally determined by the Commissioner of Internal Revenue; and

Whereas, in case such claim is filed payment of the amount of tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany its claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner of Internal Revenue, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double the amount of tax covered by such claim for abatement:

Now, therefore the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner of Internal Revenue to be due, with interest at the rate of one (1%) per cent and (½%) per cent per month from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

15 Witness our hands and seals this 29th day of May, A. D. 1924.

ERIE COAL AND COKE COMPANY.
By ——— ———, *President.*

Attest:

——— ———, *Secretary.*
GLOBE INDEMNITY COMPANY.
By CHARLES A. REID.
Resident Vice President.

Attest:

F. M. BROWN.
Resident Asst. Secretary.

Thereafter defendant filed the following written proposed findings of fact and conclusions of law.

Defendant's proposed findings of fact and conclusions of law

Comes now D. B. Heiner, defendant above named, and, deeming the facts stated in the stipulation of facts heretofore filed by the parties material to the issues herein involved, asks the court to find them as stated in the said stipulation.

Conclusions of law

And from those facts the court is respectfully requested to draw the following conclusions of law:

16 1. Section 611 of the revenue act of 1928 applies to this case.

2. The collection of the tax here involved was "stayed" within the meaning of section 611 of the revenue act of 1928.

3. Section 611 of the revenue act of 1928 prevents the collection of the $65,706.07 here in controversy from being considered an overpayment.

4. The tax here in question can not be recovered.

5. Defendant is entitled to judgment in his favor and against the plaintiff.

D. B. HEINER, *Defendant.*
JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania,
JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

Defendant then filed the following motion for judgment, which was denied, with exceptions saved to the defendant:

Motion for judgment

Comes now D. B. Heiner, defendant above named, by his
17 attorneys, and moves the court for a judgment in his favor on the ground that the pleadings and the evidence are insufficient to sustain a judgment in favor of the plaintiff.

JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania,
JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

Thereafter, and on January 28, A. D. 1929, the court made, formed, and rendered the following finding of fact, conclusions of law, and opinion:

Opinion

MCVICAR, J.:

This is an action by the Erie Coal and Coke Company against D. B. Heiner, collector of Internal Revenue, to recover the sum of $65,706.07, with interest from April 20, 1926, being the amount of a tax paid by the plaintiff to the defendant, which the plaintiff alleges was illegal. The parties filed a stipulation waiving trial by jury and

agreeing that the cause may be tried by the court. The parties also agreed upon the facts which the court finds as follows:

1. Erie Coal and Coke Company is and was on April 1, 1918, and at all times subsequent thereto a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

18 2. D. B. Heiner at the time of the payment of the tax hereinafter mentioned was and now is collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania and a resident of the city of Pittsburgh in the said Western District of Pennsylvania.

3. Erie Coal and Coke Company, the plaintiff, on April 1st, 1918, filed its tentative income and excess profits tax return for the calendar year 1917, and on June 11th filed its completed return, and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591, Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff, on May 4, 1921, filed a claim in abatement against said additional tax assessment of $133,252.87, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon, defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said 19 defendant, plaintiff paid to defendant said sum of $65,706.07.

7. On April 27, 1927, plaintiff filed with defendant a claim for refund for said tax collected as aforesaid, to wit, $65,706.07, but said claim for refund has not been acted upon.

8. When plaintiff, on May 4, 1921, filed its claim in abatement, said claim was accompanied by a bond conditioned upon the payment by the plaintiff of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment by plaintiff of the said sum of $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00 conditioned upon the payment of interest upon the said sum of $65,706.07. Plaintiff made an offer in compromise of said interest charge in the sum of $2,500.00, which offer was accepted by the Commissioner of Internal Revenue, and plaintiff accordingly paid said sum.

9. No consent in writing between the taxpayer and the Commissioner of Internal Revenue extending the statutory period of limitation (such consents being commonly known and designated as waivers) has ever been entered into in this case.

Conclusions of law

1. The tax of $65,706.07 paid by the plaintiff to the defendant April 20, 1926, was barred under the existing statutes of limitations.

20 2. Sections 607 and 611 of the revenue act of 1928 are not applicable to the facts of this case.

3. The plaintiff is entitled to judgment with costs.

Discussion

The Erie Coal and Coke Company, in April and June of 1918, filed its tentative income and excess profits tax for the year 1917 and paid the tax shown thereon, $21,456.07. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the year 1917 in the sum of $133,252.97. May 4, 1921, plaintiff filed a claim in abatement for said additional tax assessment, which was reduced in the sum of $67,546.90; the balance of the claim, $65,706.07, was rejected March 23, 1926. April 20, 1926, plaintiff, pursuant to notice of distraint warrants and under threat of actual distraint, paid said sum of $65,706.07. April 27, 1927, plaintiff claimed a refund of defendant for the amount of the tax paid which has not been acted upon.

It is admitted that the tax paid April 20, 1926, of $65,706.07 was barred at the time of payment under the then existing statutes of limitations. The question involved therefore is, as stated by the defendant—Is recovery of the tax paid by the plaintiff subsequent to the expiration of the statute of limitations upon collection precluded by section 611 of the revenue act of 1928? Defendant answers this question in the affirmative, plaintiff in the negative. We are

21 of the opinion that section 611 is not applicable and, therefore, that the plaintiff is entitled to recover. Sections 607 and 611 of the revenue act of 1928 are as follows:

"Section 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"Section 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of

such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments, made after the expiration of the period of limitation on assessment and collection."

This court, in an opinion by Judge Gibson (which we follow herein) in the case of Clinton Iron and Steel Company vs. D. B. Heiner, Collector of Internal Revenue, No. 5650, Law, decided this month, held that the sections aforesaid are not applicable. Judge Gibson, in his opinion, said:

22 "Section 607 of the act of 1928 declares any payment of tax assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be refunded or credited to the taxpayer if demand therefor is made in due time. Section 611 of the same act provides that no such payment shall be considered an overpayment if a claim in abatement of the tax was filed and the collection of the tax was stayed. It is claimed on behalf of the defendant that section 611 retroactively ratified the collection of tax which was illegal under existing laws at the time it was made.

"Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. United States v. Heinszen & Co., 206 U. S. 370; Rafferty v. Smith, Bell & Co., 257 U. S. 226. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant as collector of internal revenue at a time when existing statutory law declared that not only was the right of collection barred but that the liability had been extinguished. The plaintiff, by statute, was denied relief by injunction. It could do nothing but pay the amount unlawfully demanded and seek its remedy in an action against the collector. Before bringing such action it was required by statute to first demand the return of the amount paid from the Commissioner of Internal Revenue, it is true; nevertheless the suit is not against the

23 United States but a personal action against the collector based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the collector as that of the United States. Sage v. United States, 250 U. S. 33.

"Keeping in mind the nature of the present action, it seems plain that section 611 of the revenue act of 1928 furnishes no defense to the defendant. That section is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in United States v. Heinszen and Rafferty v. Smith, Bell & Co., supra), but a statute designed to control the commissioner and his agent. If it has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover

an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

We are of the opinion that the plaintiff is entitled to recover, and therefore direct that a form of order for judgment in its favor in accordance with this opinion, be prepared and submitted to the court.

Thereafter, and on January 29, A. D. 1929, the court rendered the following certificate of probable cause:

24 *Certificate of probable cause*

And now, on this 29th day of January, A. D. 1928, the court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the collector of internal revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of Federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

Per curiam.

V.

Thereafter, and on February 6, A. D. 1929, the court rendered the following judgment, to which the defendant objected and excepted, and his exceptions were allowed:

Judgment

And now, February 6, 1929, judgment is hereby entered in favor of plaintiff, Erie Coal and Coke Company, a corporation, and against defendant, D. B. Heiner, collector of internal revenue for the Twenty-third District of Pennsylvania, in the sum of $65,706.07, together with interest thereon from April 20, 1926, as provided by law.

Per curiam.

To the entry of which judgment the defendant objects and excepts and his exception is allowed and bill sealed.

W. H. S. Thompson.

25 In United States District Court

Order settling bill of exceptions

And now, in furtherance of justice and that right may be done, and inasmuch as the matters and things above set forth do not appear of record in said cause, and to the end that the same may be preserved in the record and presented to the honorable United States Circuit Court of Appeals for the Third Circuit, the defendant tenders and presents the foregoing as its bill of exceptions in this cause, and prays that the same may be allowed, settled, signed, sealed, made a part of the record, and ordered filed, which is accordingly done this thirtieth day of April, A. D. 1929, after presentation to opposing counsel for inspection, and within the period in which an appeal may lie from

the judgment of the court in this cause, rendered and entered on February 6, A. D. 1929.

NELSON McVICAR,
Judge for the District Court of the United States for the Western District of Pennsylvania.

Examined, approved, and agreed upon this 30th day of April, A. D. 1929.

ROSE & EICHENAUER,
Attorneys for the Plaintiff.

In United States District Court

Judgment

Filed Feb. 6, 1929

And now, February 6th, 1929, judgment is hereby entered in
26 favor of plaintiff, Erie Coal and Coke Company, a corporation, and against defendant, D. B. Heiner, collector of internal revenue for the Twenty-third District of Pennsylvania, in the sum of $65,706.07, together with interest thereon from April 20, 1926, as provided by law.

Per curiam.

To the entry of which judgment the defendant objects and excepts, and his exception is allowed and bill sealed.

W. H. S. THOMPSON.

In United States District Court

Assignment of errors

Filed Apr. 30, 1929

Comes now D. B. Heiner, collector of internal revenue for the 23rd District of Pennsylvania, defendant in the above-entitled case, and in connection with his appeal from the judgment of this honorable court, rendered herein on February 6, 1929, presents to the court his assignment of errors which he alleges were committed in the trial and proceedings in the above-entitled cause to his prejudice and injury as follows:

1. The court erred in rendering judgment for the plaintiff.
2. The court erred in denying defendant's motion for judgment and in failing to render judgment in defendant's favor.
27 3. The facts found will not support a judgment in favor of the plaintiff.
4. The stipulated facts will not support a judgment in favor of the plaintiff.

5. The court erred in holding that the tax of $65,706.07 paid by the plaintiff to the defendant April 20, 1926, was barred under the existing statutes of limitations.

6. The court erred in holding that sections 607 and 611 of the revenue act of 1928 are not applicable to the facts of this case.

7. The court erred in holding that the plaintiff is entitled to judgment with costs.

8. The court erred in failing to hold that section 611 of the revenue act of 1928 prevents the collection of the $65,706.07 here in controversy from being considered an overpayment.

Wherefore the defendant prays that the judgment rendered herein be reversed with directions to the District Court of the United States for the Western District of Pennsylvania to render judgment in favor of the defendant below.

JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania,
JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

28 In United States District Court

Petition for appeal and order allowing appeal

Filed Apr. 30, 1929

The above-named defendant, conceiving himself aggrieved by the judgment made and entered on the 6th day of February, 1929, in the above-entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania,
JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

The foregoing claim of appeal is allowed this 30th day of April, A. D. 1929.

NELSON MCVICAR,
United States District Judge.

29 In United States District Court

Stipulation for printing the record

Filed May 6, 1929

It is hereby stipulated and agreed by and between Rose and Eichenauer, attorneys for the plaintiff, and John D. Meyer, United States attorney for the Western District of Pennsylvania, and John A. McCann, special assistant to the United States attorney, attorneys for the defendant, that the following be printed as and constitute the record on appeal in the above case before the United States Circuit Court of Appeals for the Third Circuit:

1. Docket entries.
2. Statement of claim.
3. Affidavit of defense.
4. Bill of exceptions.
5. Judgment entered February 6, 1929.
6. Assignments of error.
7. Petition for appeal and order allowing appeal.
8. This stipulation.
9. Clerk's certificate.

ROSE & EICHENAUER,
Attorneys for the Plaintiff,
JOHN D. MEYER,
United States Attorney for the Western District of Pennsylvania,
JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 [Minute entry of argument and submission, Jan. 8, 1930, omitted in printing.]

32 In United States Circuit Court of Appeals, Third Circuit

No. 4138. October term, 1929

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

ERIE COAL AND COKE COMPANY, APPELLEE

Appeal from the District Court of the United States for the Western District of Pennsylvania

Opinion

Filed July 9, 1930

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges

BUFFINGTON, J.:

In the court below the Erie Coal and Coke Company brought suit against Heiner, collector of internal revenue, to recover taxes unjustly, it alleged, collected from it and paid under protest. It recovered a judgment for the amount claimed. Whereupon the collector took this appeal. The primary question is whether recovery for the taxes—which were unlawfully collected on April 20, 1926—was barred by the statute of limitations.

In considering that question we note that on April 20, 1926, when these taxes, viz, $67,706.07, were collected and paid under protest, they were barred, inasmuch as sec. 1106 (a) of the revenue act of
33 1926 provided "The bar of the statute of limitations against the United States in respect to any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability." Such being the situation, the United States having no right to the money so paid, we inquire by what right it retains this illegally collected sum or what statute creates and imposes any new liability upon the taxpayer or precludes it from recovering back the illegally collected sum. We agree with the view of the trial judge and with the holding by the same court in Clinton v. Heiner, 30 Fed. (2) 542, that sec. 611 of the revenue act of 1928 had no such effect and consequently the judgment below is affirmed.

A true copy:

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

34 In United States Circuit Court of Appeals, Third Circuit

No. 4138 (list No. 89). October term, 1929.

D. B. HEINER, COLLECTOR, APPELLANT

v.

ERIE COAL & COKE CO., APPELLEE

On appeal from the District Court of the United States for the Western District of Pennsylvania.

Judgment

Filed July 9, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, July 9, 1930.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

35 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1930